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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1036

JERRY I. BLOOM,
Petitioner,

vs.

A. H. ROBINS COMPANY, INC.,
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

The primary task of this Reply is to properly define the issue presented by the Petition for Certiorari for the answer to the question is clear.

Petitioner comes to this Court under the guise of a constitutional question, but when the constitutional masquerade is brushed aside, Petitioner seeks review of a

question of state law correctly decided by the Courts of Texas.[1]

Petitioner's constitutional assertion that his right to practice his profession has been denied him without due process of law does not square with the facts of this case. Indeed, it does not square with other contentions in the Petition itself, or more accurately, with the absence of certain contentions.

Specifically, Petitioner does not contend that the standards of either substantive or procedural due process of law were violated. He does not contend that the applicable Texas statute is arbitrary or unreasonable nor does he contend that he was denied notice and a fair hearing on the charge leveled against him. A brief summary of the relevant statute and the incident proceedings reveal that such a position would be untenable.

Article 4542(a), Vernon's Annotated Texas Civil Statutes, created the Texas State Board of Pharmacy comprised exclusively of registered pharmacists and invested the Board with power and authority to license pharmacists and to revoke a pharmacist's license on certain grounds and conditions set forth in the statute.

The statute authorizes the Board of Pharmacy to conduct investigations and make fact findings. Members of the general public have the right to make complaint to the Board and the right to communicate with the Board touching matters under consideration.

Respondent made complaint against Petitioner to the State Board of Pharmacy, and the Board, *in its discretion*, formally charged Petitioner with a statutory violation.

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1. The supposed constitutional question was first raised on Motion for Rehearing in the Supreme Court of Texas.

(R. 120) The Board gave Petitioner full and fair notice of the charge against him in writing and a full hearing was held in which Petitioner was represented by counsel. (R. 34-35) The Board's decision to suspend Petitioner's certificate for an effective period of sixty (60) days was appealed as provided by law.[2]

The constitutional masquerade is exposed. It is patently clear that Petitioner was not denied the right to practice his profession without due process of law.

The constitutional question having dissipated, Petitioner's insupportable contention becomes that Respondent did not have a right to make complaint to the State Board of Pharmacy.

The unanimous response of the Courts of Texas was that Respondent did have a right to make complaint to the State Board of Pharmacy and that its actions in so doing did not constitute wrongful interference.

The right to be free from interference is not absolute. Interference, if filing a statutory complaint with a quasi-judicial body can be so classified, is justified if one acts in the exercise of a right equal or superior to that of the party interfered with or in pursuit of some lawful interest or purpose. 45 *AM JUR* 2d, Interference, pp. 280-340; 86 *CJS*, §54, Torts, pp. 976-78; 33 *TEX JUR* 2d, Interference, pp. 93-107.

Respondent's complaint to the Texas State Board of Pharmacy was in pursuit of a lawful interest or purpose and was in the exercise of a right equal to that of Petitioner to practice his profession.

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2. The damages found by the jury are attorney's fees incident to the hearing and appeal afforded Petitioner pursuant to the due process of law he contends was denied.

The accepted practice in the drug industry to insure that drugs are dispensed as prescribed is known as "shopping". (R. 60-62; 70) On nine consecutive "shoppings" from 1956 to 1962 Petitioner's pharmacy filled doctors' prescriptions calling for Respondent's product by name with another substance. (R. 57; 115; 208; 232) On at least the last four occasions Petitioner substituted a less expensive imitation of Respondent's product sold by Petitioner to the public at the same price. (R. 57; 74; 208; 232)

Respondent inquired of the Texas State Board of Pharmacy what action should be taken and the State Board instructed Respondent to supply them with the name of the pharmacist and they would take appropriate action. (R. 117; 120; 134; 237)

Respondent had a right to investigate Petitioner's practice which had a direct economic effect upon Respondent and upon the integrity of its product. See *Harang* v. *AEtna Life Ins. Co.*, 400 S.W.2d 810 (Tex.Civ.App., Houston 1966, writ ref. N.R.E.) for a discussion of that right. Respondent had a right to make complaint based upon its findings to the State Board of Pharmacy and to communicate with the Board upon the matters involved. In so doing, Respondent followed legally designated procedures for airing its grievance with the proper authorities, and its action provided no basis for a civil action in damages. *Reagan* v. *Guardian National Life Ins. Co.*, 166 S.W.2d 909 (Tex. 1942); *Arkansas Harbor Terminal Railway Co.* v. *Taber*, 235 S.W. 841 (1921, Judgment adopted by the Supreme Court); *McAfee* v. *Feller*, 452 S.W.2d 45 (Tex.Civ.App., Houston 1970, no writ hist.); *Thornton* v. *Rio Grande National Life Ins. Co.*, 367 S.W.2d 950 (Tex. Civ.App., Waco 1963, writ ref. N.R.E.).

The decisions of the Courts of Texas are in complete accord with the applicable decisions of this Court. Only recently in *California Motor Transport Co.* v. *Trucking Unlimited*, 92 S.Ct. 609 (January 13, 1972), this Court held that one has the right of access to agencies and Courts within the limits of their prescribed procedures to protect its economic interests. This is precisely the right invoked by Respondent in the instant case.

Where as here, the act which causes the interference is justified, the motive for acting is immaterial. However, this Reply would be incomplete without observing that Respondent did not bear any malice or ill will toward Petitioner.

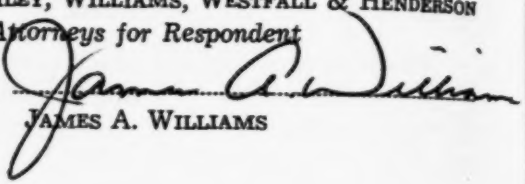
Respondent "shopped" on a nationwide basis and "shopped" over seventy pharmacies in the Dallas area alone in 1961-62. (R. 102; 110; 212-13) They did not single out Petitioner. Respondent obtained Petitioner's name only after being advised to do so by the Texas State Board of Pharmacy in order to process the complaint. (R. 117; 134; 237) Respondent acted solely to protect their financial interest and the integrity of their product. See *Martin* v. *Phillips Petroleum Co.*, 455 S.W.2d 429 (Tex.Civ.App., Houston 1970, no writ hist.).

In summary, Respondent had a right based upon its economic interest and the integrity of its product to make complaint to the State Board of Pharmacy and to communicate with the Board upon the matters involved. In so doing, Respondent followed legally designated procedures for airing such grievances through the proper authorities and their actions do not provide any basis for recovery in a civil action for damages.

Respondent respectfully submits that the Petition for Writ of Certiorari to the Supreme Court of Texas should therefore be denied.

Respectfully submitted,

JAMES A. WILLIAMS
C. EDWARD FOWLER, JR.
BAILEY, WILLIAMS, WESTFALL & HENDERSON
Attorneys for Respondent

By 
JAMES A. WILLIAMS

APPENDIX

CHAPTER EIGHT

Pharmacy

Art.

4529-4542. Repealed.

4542a. State Board of Pharmacy to regulate practice of Pharmacy; exclusion of Communists, etc.

Sec.

1. Membership; qualifications; terms; vacancies; oath.
2. Order of appointment of members; vacancies.
3. Funds received, use of.
4. Officers of board; salary; bond; by-laws and regulations.
5. Powers and duties of Board; records.
6. Meetings for examination of applicants; reports to Governor.
7. Enforcement of laws.
8. Distribution of drugs or medicines, except in original packages, unlawful; exceptions.
9. Examination; application; qualification; license; persons from other states.
10. Unlawful to impersonate applicant or fraudulently acquire license.
11. Fees; examination of books and records.
12. Revocation or suspension of license; appeal.
13. Display of certificate in place of business.
14. Annual renewal fee; practicing without renewal certificate; duplicates.

15. Stores to display "Pharmacy".

16. Unlawful use of "Pharmacy".

17. Permits for stores or factories.

18. Repeals.

19. Pharmacy, drug store, dispensary, apothecary shop or prescription laboratory defined.

20. Definitions.

4542b. Purpose of act.

Cross References

Penal provisions, see Vernon's Ann.P.C. art. 755 et seq.

Arts. 4529-4542. Repealed. Acts 1929, 41st Leg. p. 242, ch. 107 § 18

Historical Note

Articles 4529-4535, 4537-4541, repealed, were Acts 1907, p. 349; article 4542 was Acts 2nd C.S.1919, p. 88. They related to the practice of pharmacy, and defined the powers and duties of the Texas State Board of Pharmacy.

State board of pharmacy and practice of pharmacy, see, now, article 4542a.

Art. 4542a. State Board of Pharmacy to regulate practice of Pharmacy; exclusion of Communists, etc.

Membership; qualifications; terms; vacancies; oath

Sec. 1. The State Board of Pharmacy shall be composed of six (6) members to be appointed by the Governor, each of whom shall have been a registered pharmacist in this state under the provisions of law for a period of five (5) years next preceding the appointment, and who continues to be actively engaged in the practice of pharmacy

while serving the term for which he is appointed; and shall at the time of such appointment be in good standing and engaged in retail pharmacy and who is not a member of the faculty of any college or school of pharmacy, or shall have a financial interest in such school or college, and the majority of the Board shall be graduates of a recognized college or school of pharmacy. The term of office of each member of said Board shall be six (6) years. In case of death, resignation or removal of any member of the Board, the vacancy of the unexpired term shall be filled by the Governor in the same manner as other appointments. Each appointee to the State Board of Pharmacy shall within fifteen (15) days from the date of his appointment qualify by taking the Constitutional Oath of office. Provided that the present members of the Board shall serve the term for which they have been appointed. As amended Acts 1943, 48th Leg. p. 710, ch. 395 § 1.

Order of appointment of members; vacancies

Sec. 2. In making the first appointment the Governor shall appoint two members of said board for two years, two for four years and two for six years, and thereafter the term of each member shall be six years so that the terms of two members shall expire every two years. Vacancies on the board shall be filled by the Governor for the unexpired term only.

Funds received, use of

Sec. 3. The fund realized from all fees payable under this Act shall first be applied to the payment of all necessary expenses of the Board, and the remainder is to be applied by order of the Board to compensate members of said Board; said compensation to each member of the Board not to exceed Twenty-five Dollars ($25) per day, exclusive

of necessary expenses in performance of his duties. Provided, however, that the premium on any bond required of the Secretary, or any other employee of the Board, shall be paid out of said fund, as well as the expenses of any employee incurred in the performance of his duties. The State Board of Pharmacy shall defray all expenses under this law from fees provided in this Act, and the State of Texas shall never be liable for the compensation or expenses of any member of the Board, or its officers or employees, or any other expenses thereof. As amended Acts 1935, 44th Leg. p. 251, ch. 98 § 1; Acts 1943, 48th Leg. p. 710, ch. 395 § 2; Acts 1959, 56th Leg. p. 1068, ch. 489 § 1.

Officers of board; salary; bond; by-laws and regulations

Sec. 4. Said Board within thirty (30) days after appointment shall meet and organize by electing a president and vice-president and treasurer from its membership, and a secretary who may or may not be a member of the Board, whose salary shall be fixed by the Board. The secretary and treasurer shall each be required to execute a bond in the sum of Ten Thousand ($10,000.00) Dollars for the faithful performance of his duties, payable to the State of Texas. The Board shall have the power to make by-laws and regulations, not inconsistent with the law, for the proper performance of its duties and the duties of its officers and employees, and shall have the power to employ the necessary employees to carry out the provisions of this Act. As amended Acts 1951, 52nd Leg. p. 824, ch. 469 § 1.

Powers and duties of Board; records

Sec. 5. The Board shall preserve a record of its proceedings in a book kept for that purpose. A record shall be kept showing the name, age and last known mailing address of each applicant for examination, the name and location of the University, School or College of Pharmacy

from which he holds credentials, and time devoted to the study and practice of pharmacy, together with such other information as the Board may desire to record. Said record shall also show whether applicants were rejected or licensed, and shall be prima facie evidence of all matters therein contained.

The Board shall have power to appoint committees from its own membership. The duties of such committees shall be to consider such matters pertaining to the enforcement of this Act and the regulations promulgated in accordance therewith as shall be referred to said Committees, and they shall make recommendations to the Board with reference thereto.

The Board, any Committee, or any member thereof, shall have the power to issue subpoenas and subpoenas duces tecum to compel the attendance of witnesses and the production of books, records, and documents; to administer oaths and to take testimony concerning all matters within its or his jurisdiction. The Board shall not be bound by strict rules of procedure or by the rules of evidence in the conduct of its proceedings, but the determination shall be founded upon sufficient legal evidence to sustain it. The Board may be represented by the Attorney General, or by the District Attorney or the County Attorney, and by other counsel when necessary.

The Board shall have the right to institute an action in its own name to enjoin the violation of any of the provisions of this Act. Said action for injunction shall be in addition to any other action, proceeding or remedy authorized by law.

If a witness refuses to comply with said subpoena issued by said Board, or if a witness in attendance before the Board, or one of its duly appointed Committees, refuses

without reasonable cause to be examined or to answer a legal or pertinent question, or to produce books, records or papers, or to furnish other information when ordered to do so by the Board, the Board may apply to the Judge of the District Court of any county, and, upon proof of affidavit of the fact, have a rule or order, returnable in not less than one (1) nor more than five (5) days, directing such witness to show cause before the court who made the order, or any other District Judge of said county, why he should not be punished for contempt. Upon the return of such order, the Judge before whom the matter shall come for hearing shall examine under oath such witness or person, and such person shall be given an opportunity to be heard, and if the Judge shall determine that such person has refused, without reasonable cause or legal excuse, to be examined or answer a legal or pertinent question, or to produce such books, records and documents as he was ordered to bring or produce, he shall forthwith punish the offenders as for contempt of court.

Subpoenas shall be served and witnesses' fees and mileage paid, as in civil cases in the District Court in the county to which such witnesses shall be called. Witnesses subpoenaed at the instance of the Board shall be paid their fees and mileage by the Board out of the funds provided for in this Act.

The Board shall adopt an official seal and license of suitable design and shall maintain an office where all of the permanent records shall be kept. As amended Acts 1943, 48th Leg. p. 710, ch. 395 § 3.

Meetings for examination of applicants· reports to Governor

Sec. 6. The State Board of Pharmacy shall hold regular meetings for the examination of applicants for registration,

and for the transaction of such other business as may legally come before it twice a year, and may hold such additional special meetings as may be necessary. The time and place of the regular meetings shall be designated at a regular session of the Board, and the additional meetings to be held at such places and on such dates as may be designated by the President of the Board.

The Board shall make annually to the Governor of the state a regular report of its receipts and disbursements; also the names of all pharmacists duly registered under this Act during the fiscal year for which the report is made, and the names of all pharmacists whose licenses or permits have been cancelled during the fiscal year. As amended Acts 1943, 48th Leg. p. 710, ch. 395 § 4.

Enforcement of laws

Sec. 7. It shall be the duty of the State Board of Pharmacy to see that all laws which pertain to the practice of pharmacy are enforced and to cooperate with other State and Federal Agencies regarding any violations of any drug laws. As amended Acts 1943, 48th Leg. p. 710, ch. 395 § 5; Acts 1957, 55th Leg. p. 1324, ch. 447 § 2.

Distribution of drugs or medicines, except in original packages, unlawful; exceptions

Sec. 8. It shall be unlawful for any person who is not a registered pharmacist under the provisions of this Act to compound, mix, manufacture, combine, prepare, label, sell, or distribute at retail or wholesale any drugs or medicines, except in original packages. Provided that all persons now registered as pharmacists in this State shall have all the rights granted to pharmacists under this Act. Provided, however, that nothing in this Act shall apply to or interfere with any licensed practitioner of medicine,

dentistry, or chiropody, who is duly registered as such by his respective State Board of Examiners of this State, who shall supply his or her patients, as a physician, dentist, or chiropodist, and by them employed as such, with such remedies as he or she may desire and who does not keep a pharmacy, open shop, or drug store, advertised or otherwise, for the retailing of medicines or poisons; and provided, further, that nothing contained in this Act shall be construed to prevent the personal administration of drugs and medicines carried by any physician, surgeon, dentist, chiropodist, or veterinarian licensed by his respective Board of Examiners of this State, in order to supply the immediate needs of his patients; nor to prevent the sale by persons, firms, joint stock companies, partnerships, or corporations, other than registered pharmacists, of patent or proprietary medicines, or remedies and medicaments generally in use and which are harmless if used according to instructions as contained upon the printed label, with the exception, however, of exempt narcotics; and insecticides and fungicides and chemicals used in the arts, when properly labeled; nor insecticides or fungicides that are mixed or compounded for purely agricultural purposes.

Provided further, this Section shall not apply to:

(1) members of the faculty of a reputable college or school of Pharmacy recognized by the Texas State Board of Pharmacy where such faculty members who are registered pharmacists, perform their services for the sole benefit of such school or college, or to

(2) senior students of a reputable college or school of Pharmacy recognized by the Texas State Board of Pharmacy who perform their services without pay in the presence and under the direct supervision of a registered pharmacist who is a member of the staff of a reputable

college or school of Pharmacy recognized by the Texas State Board of Pharmacy, provided that the sale of such preparations and prescriptions so compounded by such senior students shall be restricted to duly registered students of the college or university attended by such senior students. As amended Acts 1943, 48th Leg. p. 710, ch. 395 § 6; Acts 1951, 52nd Leg. p. 824, ch. 469 § 2; Acts 1953, 53rd Leg. p. 916, ch. 378 § 1; Acts 1959, 56th Leg. p. 1068, ch. 489 § 2.

Examinations; application; qualification; license; persons from other states

Sec. 9. Every person desiring to practice pharmacy in the State of Texas shall be required to pass the examination given by the State Board of Pharmacy. The applicant shall make application by presenting to the secretary of the Board, on forms furnished by the Board, satisfactory sworn evidence that he has attained the age of twenty-one (21) years, is of good moral character, is a citizen of the United States, and has at least graduated from a first grade high school, or has a preliminary education equivalent thereto, permitting matriculation in The University of Texas, and that he has attended and graduated from a reputable university, school, or college of pharmacy which meets with the requirements of the Board, and shall have had at least one thousand (1,000) hours of practical experience in a retail pharmacy under the direct supervision of a registered pharmacist as follows: the applicant shall have been actually employed substantially all of one (1) year in such capacity, provided that part time employment of not more than forty (40) hours per week gained in a maximum of eight (8) hour days may be credited toward the minimum practical experience to fulfill this requirement. If the applicant does not actually work substantially all of

one (1) year in any calendar year period, the time actually worked may be added to work he may perform during the following year or years in order to fulfill one thousand (1,000) hours of practical experience. A university, school, or college of pharmacy is reputable whose entrance requirements and course of instruction are as high as those adopted by recognized universities, schools, or colleges of pharmacy, and whose course of instruction shall be the equivalent of not less than four (4) terms of eight (8) months each, and approved by the Board.

The examination shall consist of written, oral, and/or practical tests in pharmacy, chemistry, pharmaceutical jurisprudence, posology, toxicology, bacteriology, physiology, pharmacognosy, and pharmacology, and in such other subjects as may be regularly taught in all recognized universities, schools, and colleges of pharmacy.

Each applicant for license to practice pharmacy in Texas shall be given due notice of the time and place of examination. All examinations shall be conducted in writing and by such other means as the State Board of Pharmacy shall deem adequate to ascertain the qualifications of applicants, and in such manner as shall be entirely fair and impartial to all individuals in every recognized school of pharmacy. All applicants examined at the same time shall be given the same regular examinations, and each applicant successfully passing the examination and meeting all requirements of the State Board of Pharmacy shall be registered by the Board as possessing the qualifications required by this law, and shall receive from said Board a license to practice pharmacy in this State. Provided that the State Board of Pharmacy may, in its discretion, upon the payment of Fifty Dollars ($50), grant a license to practice pharmacy to persons who furnish proof that they

have been registered as such in some other state or territory, and that they are of good moral character, provided that such other Board in its examination required the same general degree of fitness required by this State, and grants the same reciprocal privileges to pharmacists of this State.

No person who is a member of the Communist Party, or who is affiliated with such party, or who believes in, supports, or is a member of any group or organization that believes in, furthers, or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods, shall be authorized to practice pharmacy in the State of Texas, or to receive a license to practice pharmacy in the State of Texas.

Every person admitted to practice pharmacy in the State of Texas shall, before receiving his license, make oath that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in and is neither a member of nor supports any group or organization that believes in, furthers, or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods.

Any person who shall falsely make the affidavit prescribed in the foregoing paragraph shall be deemed guilty of fraudulent and dishonorable conduct, and malpractice, and shall be subject to all penalties which may be prescribed for making false affidavit. As amended Acts 1943, 48th Leg. p. 710, ch. 395 § 7; Acts 1951, 52nd Leg. p. 824, ch. 469 § 3; Acts 1959, 56th Leg. p. 1068, ch. 489 § 3.

Unlawful to impersonate applicant or fraudulently acquire license

Sec. 10. It shall be unlawful for any person to impersonate before the Board an applicant applying for regis-

tration or license under this Act, or to fraudulently acquire a license in any other manner than provided for in this Act.

Fees, examination of books and records

Sec. 11. The State Board of Pharmacy shall charge a fee of Twenty Dollars ($20) for examining an applicant for license, which fee must accompany the application. If an applicant who, because of failure to pass the examination, is refused a license, he shall be permitted to take a second examination without additional fee, provided the second examination is taken within a period of one (1) year. The State Auditor of the State of Texas shall, not less than once each year, examine and audit the books and records of the State Board of Pharmacy, and report his findings to the Governor of the State of Texas. As amended Acts 1943, 48th Leg. p. 710, ch. 395 § 8; Acts 1959, 56th Leg. p. 1068, ch. 489 § 4.

Revocation or suspension of license; appeal

Sec. 12. The State Board of Pharmacy may in its discretion refuse to issue a license to any applicant, and may cancel, revoke, or suspend the operation of any license by it granted for any of the following reasons:

(a) That said applicant is guilty of gross immorality;

(b) That said applicant or licensee is guilty of any fraud, deceit, or misrepresentation in the practice of pharmacy or in his seeking admission to such practice;

(c) That said applicant or licensee is unfit or incompetent by reason of negligence;

(d) That said applicant or licensee has been convicted of a felony or a misdemeanor which involves moral turpitude;

(e) That said applicant or licensee is an habitual drunkard or is addicted to the use of morphine, cocaine, or other drugs having similar effect, or has become insane or has been adjudged by a court of competent jurisdiction to be of unsound mind;

(f) That said licensee, directly or indirectly, aids or abets in the practice of pharmacy any person not duly licensed to practice under this Act; provided further, that the said licensee is responsible for the legal operation of the pharmacy, dispensary, prescription laboratory or apothecary shop as long as his name appears on the permit issued for the operation of such establishments;

(g) That said applicant or licensee has been convicted in either a State or Federal Court of the illegal use, sale, or transportation of intoxicating liquor, narcotic drugs, barbiturates, amphetamines, desoxephedrine, their compounds or derivatives, or any other dangerous or habit-forming drugs;

(h) That said licensee has engaged in the act of "substitution" as that term is hereinafter defined. The term "substitution" as used in this Act shall mean the dispensing of a drug or a brand of drug other than that which is ordered or prescribed without the express consent of the orderer or prescriber. If the consent of the orderer or prescriber for substitution by the licensee is obtained, a notation shall be made by the licensee on the prescription stating that such consent has been obtained and by whom such consent was given, and such notation shall, in addition, specify the drug or brand of drug so substituted;

(i) That said licensee is a member of the Communist Party or affiliated with such party.

Revocation, cancellation, or suspension of a license shall be only after ten (10) days notice and a full hearing.

Any person whose license to practice pharmacy has been refused, revoked, or suspended by the Board may, within twenty (20) days after the effective date of the order, decision, or ruling of the Board, take an appeal to any of the District Courts where said applicant resided at the time the offense was committed which resulted in the Board's action refusing, revoking, or suspending said license. As amended Acts 1943, 48th Leg. p. 710, ch. 395 § 9; Acts 1957, 55th Leg. p. 1324, ch. 447 § 2; Acts 1959, 56th Leg. p. 1068, ch. 489 § 5.

(The remaining sections of Article 4542(a) are not pertinent.)

CERTIFICATE OF SERVICE

This is to certify that on the 22 day of February, 1973, three copies of the foregoing Brief were mailed, properly addressed, postage prepaid, to attorney for Petitioner, Morris I. Jaffe, 1000 LTV Tower, Dallas, Texas 75201.

James A. Williams

JAMES A. WILLIAMS